

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

UNITED STATES OF AMERICA,)
)
v.)
)
ADAM J. GILBURNE,)
Defendant.)

INFORMATION

The United States Attorney charges that at all times material to this Information:

COUNT ONE
Conspiracy to Commit Wire Fraud and Securities Fraud
Title 18, United States Code, Section 371

INTRODUCTION

1. Defendant **ADAM J. GILBURNE** was the Vice-President of Operations/Sales at Just for Feet, Inc. (“JFF”) from March 1994 to January 1996. From January 1996 to August 1997, **GILBURNE** was Executive Vice-President of JFF. From August 1997 until May 1999, **GILBURNE** was Executive Vice-President of JFF and President of the Superstore Division of JFF. Defendant **GILBURNE** reported directly to the Chief Executive Officer of JFF (“the CEO”).

2. JFF was a publicly traded corporation with its headquarters in Shelby County, Alabama. JFF was founded in 1977 with a single store in Birmingham, Alabama. By 1999 it had grown to be the second largest athletic shoe retailer in the United States with locations in

thirty states and annual sales of approximately \$775 million. At all times relevant to this Information, JFF's stock was traded on the National Association of Securities Dealers Automated Quotation System ("NASDAQ") under the symbol "FEET."

3. JFF was an issuer of a class of securities registered under Section 12 of the Securities Exchange Act of 1934 ("the Act"). To sell securities to members of the public and maintain public trading of its securities in the United States, JFF was required to comply with the provisions of the federal securities laws, including Section 13(a) of the Act (Title 15, United States Code, Sections 78m(a) and 78o(d)) and the regulations promulgated thereunder, that were designed to ensure that the company's financial information was accurately recorded and disclosed to the public.

4. Under provisions of the federal securities laws and the provisions promulgated thereunder, JFF was required to, among other things (a) file with the United States Securities and Exchange Commission ("SEC") annual financial statements audited by an independent accountant; (b) file with the SEC quarterly updates of its financial statements that disclosed its financial condition and the results of its business operations for each three-month period; (c) make and keep books, records, and accounts that accurately and fairly reflected the transactions and dispositions of the company's assets; and (d) devise and maintain a system of internal accounting controls sufficient to provide – (i) reasonable assurances that the company's transactions were recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles ("GAAP") and other criteria applicable to such statements and to maintain the accountability of assets; and (ii) reasonable assurances

that the recorded accountability for assets was compared with the existing assets at reasonable intervals and appropriate action was taken with respect to any differences.

5. Beginning in 1994, when JFF issued its initial public offering, it filed quarterly reports, called Forms 10-Q, and annual reports, called Forms 10-K, with the SEC at its headquarters located in Washington, D.C. These reports were transmitted directly and indirectly from JFF's offices in Birmingham, Alabama, to the offices of an Atlanta, Georgia, filing agent that assists companies in electronically filing periodic reports with the SEC, and were thereafter transmitted electronically to and filed electronically with the SEC, where they were available to the investing public.

CERTAIN RELEVANT ACCOUNTING PRINCIPLES AND PRACTICES

6. Public companies, such as JFF, typically report the financial results of their operations in financial statements that include both an Income Statement and a Balance Sheet. A company's Income Statement reports, among other things, revenue recognized, expenses incurred, and income earned during a stated period of time – usually for a fiscal quarter or fiscal year. Within an Income Statement, expenses are generally subtracted from revenues to calculate net income. A company's Balance Sheet reports, among other things, the assets and liabilities of a company at a given point in time, usually at the end of a fiscal quarter or the end of a fiscal year.

7. JFF's fiscal year ran from February 1 to January 31. In January 1999, JFF changed the last day of its fiscal year from January 31st to the Saturday closest to January 31st. As a result, the last day of JFF's fiscal year 1998 was January 30, 1999.

JFF'S COMMUNICATIONS WITH INVESTORS

8. The management of many public companies, including JFF, provided "guidance" to the investing public regarding anticipated earnings per share for upcoming reporting periods. Relying in part on a company's "guidance," many professional securities analysts then disseminated to the public their own estimates of the company's expected performance. These "earnings estimates" or "analyst expectations" were considered and relied upon by investors. Often, if a company announces earnings that fail to either meet or exceed analyst expectations, the price of the company's securities will decline.

CERTAIN RELEVANT ADVERTISING INDUSTRY PRACTICES

9. Rogers Advertising was an advertising agency located in Birmingham, Alabama. At all times relevant to this Information, Rogers Advertising was JFF's sole advertising agency and placed all of JFF's radio and television advertising.

10. It was common practice in the advertising industry for an agency such as Rogers Advertising to receive a 15% discount when placing ads with television stations. For example, if Rogers Advertising placed an ad which cost \$10,000 to run, the station would charge Rogers Advertising \$8,500. Rogers Advertising would then charge the client \$10,000 and keep the \$1,500 discount, known as an agency commission, for itself.

11. Although Rogers Advertising often placed ads with television stations weeks or months in advance, it did not have to pay the various television stations, and thus, did not earn its agency commission until the ad actually ran. Likewise, Rogers Advertising did not bill the client for television ads unless and until the ads actually ran on television. Because of the seasonal

nature of the retail athletic shoe business, most sales, and hence, most television ads occurred during the “Back to School” and Christmas seasons.

JFF'S QUARTERLY EARNINGS MEETINGS

12. Beginning at least in or about 1996, the CEO of JFF would conduct meetings towards the end of every quarter in which he would set out “the Street’s” expectations, i.e. the "earnings expectations" or "analyst expectations" of Wall Street investment firms and others, of JFF’s earnings for that quarter, his own targets for JFF’s earnings for that quarter, which often exceeded those of “the Street,” as well as JFF’s actual revenue to date. The CEO would then draw up a list of “goods,” i.e. those items which produced or added income, and “bads,” i.e. those items which reduced income. The CEO would then direct JFF employees to find ways to increase the “goods” and decrease the “bads” in order to meet his own earnings targets as well as “the Street’s” expectations.

THE CONSPIRACY

13. Beginning in or about December 1996 and continuing until in or around November 1999, within the Northern District of Alabama and elsewhere, the defendant, **ADAM J. GILBURNE**, and others, knowingly and willfully conspired and agreed with each other, to commit offenses against the United States, to wit:

(1) to devise and attempt to devise a scheme and artifice to defraud and to obtain money and property by means of materially false and fraudulent pretenses, representations and promises and to knowingly transmit and cause to be transmitted, by means of wire communication, in interstate and foreign commerce, writings, signs, signals and sounds for the

purpose of executing such scheme and artifice in violation of Title 18, United States Code, Section 1343; and

(2) to willfully and knowingly make and cause to be made false and misleading statements of material fact in applications, reports and documents required to be filed under the Securities and Exchange Act of 1934 and the rules and regulations thereunder in violation of Title 15, United States Code, Sections 78m(a) and 78ff and Title 17, Code of Federal Regulations, Section 240.13a-1; 13a-13 and 13b2-2.

PURPOSE OF THE CONSPIRACY

14. A purpose of the conspiracy was for the defendant, **ADAM J. GILBURNE**, the CEO and others to fraudulently inflate JFF's publicly reported income, earnings, and earnings per share through the improper recognition of income purportedly received from Rogers Advertising.

THE MANNER AND MEANS OF THE CONSPIRACY

The manner and means by which the defendant and others sought to accomplish the conspiracy included, among other things, the following:

15. It was part of the conspiracy that defendant **GILBURNE**, the CEO and others engaged in an illegal scheme to inflate artificially JFF's publicly reported earnings and earnings per share and to falsify reports of JFF's financial condition.

16. It was part of the conspiracy that the CEO and the President of Rogers Advertising ("Rogers' President") would meet prior to the end of JFF's fiscal year and agree that Rogers Advertising would pay the agency commissions which it would earn for the upcoming year, minus a monthly retainer, back to JFF. This became known within JFF as the "Rogers Rebate."

17. It was part of the conspiracy that defendant **GILBURNE**, the CEO and others, knowing that the Rogers Rebate represented monies which they anticipated could be earned by Rogers Advertising and paid to JFF in the following fiscal year, nonetheless caused JFF to record the Rogers Rebate as income earned and a receivable due and owed to JFF in JFF's current fiscal year.

18. It was further part of the conspiracy that the CEO instructed defendant **GILBURNE** and others that if anyone asked about the Rogers Rebate, they were to tell that person falsely that the Rebate was based on services already performed during the current year.

19. It was part of the conspiracy that defendant **GILBURNE**, the CEO and others, in order to make the Rogers Rebate appear to represent earned income for the current fiscal year, created and caused to be created false and fraudulent documents and records.

20. It was part of the conspiracy that, defendant **GILBURNE**, the CEO and others, in order to make the Rogers Rebate appear to represent earned income for the current fiscal year, placed and caused to be placed false and fraudulent documents in the records of JFF.

21. It was part of the conspiracy that, after it became apparent that JFF would not spend enough in advertising in a given year to generate sufficient income for Rogers Advertising to pay down the Rogers Rebate receivable that had been recorded in the prior year as income and a receivable due and owing to JFF, defendant **GILBURNE**, the CEO, and others, in order to give the appearance that the Rogers Rebate receivable was fully collectable, agreed with the Rogers' President that Rogers Advertising would fraudulently over-bill JFF in order to provide Rogers Advertising with money to pay down the balance of the Rogers Rebate receivable previously booked by JFF.

22. It was further part of the conspiracy that defendant **GILBURNE**, the CEO and their co-conspirators made and caused to be made these false and fraudulent entries in JFF's books and records knowing, and intending (1) that such entries would ultimately be reflected in JFF's financial statements and public filings with the SEC; (2) that JFF's financial statements and public filings would falsely overstate JFF's revenue, earnings and earnings per share; and (3) that the investing public would rely upon such fraudulently overstated earnings and earnings per share.

OVERT ACTS

23. On or about April 22, 1997, the CEO signed JFF's 10-K for JFF's fiscal year 1996, knowing that because of the Rogers Rebate scheme, JFF's income, as reported in the 10-K, was overstated by \$730,000.

24. In or around December 1997, the CEO met with defendant **GILBURNE** and explained to him that he had devised a way to increase JFF's income for that year (1997) by \$3 million. The CEO further cautioned defendant **GILBURNE** that if anyone should ask about the Rogers Rebate, defendant **GILBURNE** should falsely say that the Rebate was based on business already performed by Rogers Advertising in 1997.

25. In or around January 1998, the CEO, defendant **GILBURNE** and others caused a false credit memorandum for \$3 million from Rogers Advertising to be entered into JFF's books and records.

26. On or about April 24, 1998, the CEO signed JFF's 10-K for JFF's fiscal year 1997, knowing that because of the Rogers Rebate scheme, JFF's income, as reported in the 10-K, was overstated by \$3 million.

27. In or around June 1998, defendant **GILBURNE**, the CEO, Rogers' President and others agreed that Rogers Advertising would be allowed to fraudulently over-bill JFF in order to provide Rogers Advertising with money to repay the balance of the \$3 million receivable that Rogers Advertising purportedly owed to JFF.

28. On or about December 15, 1998, defendant **GILBURNE** agreed with the CEO and Rogers' President that the Rogers Rebate for the upcoming year would be \$5.3 million.

29. In or around January 1999, the CEO, and others caused JFF to record \$5.3 million in income and receivables from Rogers Advertising to be entered into JFF's books and records as of January 30, 1999.

30. In or around February 1999, knowing that JFF would not spend enough for advertising that year to generate sufficient income from advertising discounts for Rogers Advertising to pay down the \$5.3 million receivable purportedly owed to JFF, defendant **GILBURNE**, the CEO, Rogers' President and others discussed how JFF could provide Rogers Advertising with money to pay down the \$5.3 million receivable which had previously been booked by JFF.

31. In or around February 1999, the CEO, Rogers' President and others agreed that, beginning in the second quarter of 1999, Rogers Advertising would be allowed to over-bill JFF \$250,000 per month through the remainder of 1999 in order to provide Rogers Advertising with money to pay down the \$5.3 million receivable.

32. On or about April 30, 1999, the CEO signed JFF's 10-K for JFF's fiscal year 1998, knowing that because of the Rogers Rebate scheme, JFF's income as reported in the 10-K was overstated by \$5.3 million.

33. In or around May 1999, defendant **GILBURNE** spoke to Rogers' President about over-billing JFF by \$250,000 in order to give Rogers Advertising enough money to make a partial repayment of the balance of \$5.3 million receivable that Rogers Advertising purportedly owed to JFF.

All in violation of Title 18, United States Code, Section 371.

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